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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-957

RICHARD R. SHALLA,
Petitioner,
v.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, and HONORABLE PHILIP PRATT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Your petitioner, Richard R. Shalla, prays that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Sixth Circuit entered December 28, 1971.

OPINIONS BELOW

The decision of the United States District Court for the Eastern District of Michigan, Southern Division, is not yet reported, but is made a part of this Petition by reference and is to be found in the Appendix at 2a.

The Order of the United States Court of Appeals for the Sixth Circuit is not yet reported, but the Order of the Court is contained in the Appendix at 29a.

JURISDICTION

The Order of the Court below was entered on December 28, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) Under the Federal Rules of Criminal Procedure and the Constitution of the United States, may the United States Government indict a citizen of this country on hearsay testimony alone when direct evidence is available?

(2) Is there a denial of due process under the Constitution and laws of this country when the United States Government fails to transcribe the testimony before a Grand Jury which subsequently indicted a citizen?

(3) Is mandamus relief available and appropriate in this case?

STATEMENT

Petitioner, Richard R. Shalla, was at all revelant times an automobile dealer doing business in Detroit, Michigan. During the years 1964 through 1967, a friend of his, Harry Mutter, gave him certain monies which the Petitioner interpreted to be gifts and accordingly did not report them on his federal income tax return. The government contended that these monies were, in fact, income and on March 16, 1971, Richard R. Shalla was indicted by a Federal Grand Jury on four counts of income tax evasion in violation of 26 USCA §7201. At the Grand Jury hearings, the government did not allow the Petitioner to testify although he offered to do so both orally and in writing. Furthermore, it did not appear that Harry Mutter, the only other person with personal knowledge of the facts, was called to testify.

In order to obtain a clear factual picture of what occurred before the Grand Jury, the Petitioner filed a Motion for Discovery under Rule 6(e) of the Federal Rules of Criminal Procedure. The Petitioner sought confirmation of his claim that no transcript was made and that only hearsay evidence was presented before the Grand Jury when direct evidence was readily available. That motion was denied by this Respondent on August 9, 1971. Subsequently, a Motion to quash the indictment on the grounds that the United States Government presented solely hearsay evidence before the Grand Jury, which handed down the indictment even though direct evidence was available, and there was no transcript made of the Grand Jury proceedings; however, the Motion to quash the indictment is supported by an affidavit setting forth the basic facts alleging the use of hearsay only and that no counter-affi-

davit or denial of this affidavit has been filed by the Government (see Appendix A). Said Motion to Quash the indictment was denied by the Honorable Philip Pratt on November 8, 1971, and a copy of his opinion and order is attached hereto and made a part hereof.

A Writ of Mandamus was filed in the United States Court of Appeals for the Sixth Circuit requesting the issuance of a writ ordering and directing the district judge and in particular, Honorable Philip Pratt, to grant Petitioner's motion to quash the indictment. Said Writ was denied by the United States Court of Appeals for the Sixth Circuit on December 28, 1971. The District Judge filed a Response to the Writ of Mandamus (see Appendix C) and the District Attorney filed a response to the Writ of Mandamus (see Appendix D).

REASONS FOR GRANTING THE WRIT

The Remedy of a Writ of Mandamus is Both Available and Appropriate.

A. Authority to Issue Mandamus

The authority of the Supreme Court to issue mandamus is founded upon the *All Writs Act, 28 U.S.C. 1651* which provides that:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective Jurisdictions and agreeable to the usages and principles of law.

Rule 21 of the Federal Rules of Appellate Procedure establishes the procedure to be followed in petitioning for

a Writ of Mandamus. Both the All Writs Act and Rule 21 apply in this case and provide the necessary authority and procedure for the writ sought by Petitioner.

B. Respondent's Order if Non-appealable

The extraordinary remedy of mandamus may not be resorted to as a mode of review where a statutory method of appeal has been prescribed. *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 27-28 (1943) and cases cited therein. Petitioner's right of appeal in criminal cases is provided for by, and limited to, the provisions of the Criminal Appeals Act, 18 U.S.C. §3731, including the recent amendments thereto, Public Law 91-644, 91st Congress, H.R. 17825, approved January 2, 1971. See e.g., *Will v. United States*, 389 U.S. 90 (1967); *Di Bella v. United States*, 369 U.S. 121 (1961); *United States v. Bordon Co.*, 308 U.S. 188 (1939); and *United States v. Koenig*, 290 F.2d 166 (5th Cir. 1961), affirmed 369 U.S. 121 (1961). A review of the provisions of that Act reveals that there is no statutory right of appeal in this case. For example, there has been no dismissal or setting aside of the indictment, or suppression of evidence, which would come within the terms of 18 U.S.C. 3731; however, Petitioner maintains that the Constitutional questions raised by this mandamus are of grave importance in the proper administration of the Federal Rules of Criminal Procedures and the laws of the United States. See *United States v. Apex Distributing Co.*, 270 F.2d 747 (9th Cir. 1959); *Will v. United States*, supra, *and United States v. Kanan*, 341 F. 2d 509 (9th Cir. 1965). The recent amendments to the Criminal Appeals Act, Public Law 91-644, are designed to allow appeal in a case of a dismissal following failure to comply with an order for discovery (see Senate Report No. 911296, pp. 2, 5, 18), but

those amendments are inapplicable to this proceeding. The amendments became effective January 2nd and the law expressly provides that the "amendments shall not apply with respect to any criminal case begun in any district court before the effective date of this section."

C. Issue is Extraordinary

As Justice Black stated in his concurring opinion in *Will v. United States*, supra,

> "I agree that mandamus is an extraordinary remedy which should not be issued except in extraordinary circumstances. And I also realize that the granting of mandamus may bring about a review of a case as would an appeal. Yet this does not deprive a court of its power to issue the writ. Where there are extraordinary circumstances, mandamus may be used to review an interlocutory order which is by no means 'final' and thus appealable under federal statutes. 389 U.S. at 108."

The Sixth Circuit recently passed upon this question in the case of *United States of America v. United States District Court for the Eastern District of Michigan, Southern Division, and Honorable Damon J. Keith.* Judge Edwards in the majority of the opinion spoke on this question as follows:

> "Preliminary to answering this question, there is a challenge to our jurisdiction. It is claimed that mandamus is not an appropriate form of action in which to review the question just posed in the context of the instant case. It is clear that the District Court order under attack is a pretrial order, interlocutory in nature, and hence, not appealable under 28 U.S.C. §1291 (1964) which conveys appellate power to this court to review only 'final' orders of the District Courts. *Cogen v. United States*, 278 U.S. 221 (1929). Nor is the order here under attack

subject to appeal under 28 U.S.C. §1292 (1964), which grants appellate power to this court in certain limited classes of interlocutory orders, nor under 18 U.S.C. §3731 (Supp. V. 1965-69), which deals specifically with criminal appeals.

"It is, of course, the general rule that mandamus may not be substituted for appeal. *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 30-31 (1943); *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379; 382 (1953); *Black v. Boyd*, 248 F.2d. 156, 159 (6th Cir.) *Hoffa v. Gray*, 323 F.2d 178, 179 (6th Cir.) cert. denied, 375 U.S. 907 (1963); *University National Stockholder's Protective Comm., Inc. v. University National Life Ins. Co.*, 328 F. 2d. 425, 426 (6th Cir.) cert. denied, 377 U.S. 933 (1964).

"Petitioner, United States, however, points to the All Writs Statute, 28 U.S.C. §1651 (1964), as source of this court's power to grant the writ prayed for and argues that this is an extraordinary case wherein the respondent has entered an illegal order which, if allowed to stand, 'would result in grave and irreparable harm to legitimate Governmental interests.'

"Concerning the use of mandamus in 'exceptional cases' this Court has said:

> 'It is settled that although sparingly used, the power to issue a writ of mandamus exists and will be exercised by the court when in its discretion the exceptional circumstances of the case require its use. Its use in such exceptional cases, however, does not mean that the All Writs Statute grants the appeliate court a general power to supervise the administration of justice in the district court and to review any otherwise unappealable order. *Black v. Boyd*, 248 F.2d. 156, 159-60 (6th Cir. 1957).'

"See also *Ex parte United States*, 287 U.S. 241 (1932); *LaBuy v. Howes Leather Co.*, 352 U.S. 249

(1957); *Will v. United States*, 389 U.S. 90, 95-98 (1967).

"In this last case, Justice Black in a concurring opinion, said:

> 'I agree that mandamus is an extraordinary remedy which should not be issued except in extraordinary circumstances. And I also realize that the granting of a mandamus may bring about the review of a case as would an appeal. Yet this does not deprive a court of its power to issue the writ. Where there are extraordinary circumstances, mandamus may be used to review an interlocutory order which is by no means 'final' and thus appealable under federal statutes. *Will v. United States*, supra, at 108.'

"From what has already been said, it is obvious that we agree that this is in all respects an extraordinary case. Great issues are at stake for all parties concerned. Further, the government asserts the illegality of the order, that it represents an abuse of the District Judge's discretion, and claims that it will have the effect of forcing the government to dismiss the prosecution of one defendant.

"If this were not enough to occasion our deciding case on the merits rather than on procedural grounds, it also clearly appears that the issue posed here is a basic issue which has never been decided at the appellate level by any court. It has been decided favorably to the government's position by two District Courts and adversely to the government by two others. The Courts of Appeals have the power to review by mandamus 'an issue of first impression.' *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964) involving a 'basic and undecided problem.' *Id.* at 110. We hold that this Court has jurisdiction to decide this petition."

In the instant case, Petitioner claims that his legal and constitutional rights of due process and fair play have been denied him by the denial of the Motion in question. It is essential, or at least it should be in these modern times, that a transcript of the proceedings against the Petitioner should be transcribed and readily available so that Petitioner and his counsel are in a position to know the identity of the witnesses who appeared against him and the nature of their testimony and for the Government to proceed in this case in the manner it did, namely: to conduct a Grand Jury proceeding without recording the nature of the testimony and the evidence presented and identity of the witnesses was a denial of Petitioner's legal and constitutional rights in this case and furthermore, where it is clear and undenied that the indictment returned is based purely on heresay evidence when direct evidence was available as to the nature of the transaction upon which the Petitioner has been indicted is clearly wrong and subverts all principles of fair play and decency. Therefore, we contend that these factors represent extraordinary circumstances giving to this Court the authority and jurisdiction under the above quoted authorities to take jurisdiction to decide these fundamental and basic questions, in order to properly insure the proper and fair administration of criminal justice, to pass upon these questions.

D. The Issue Is One of Great Importance To The Fair and Proper Administration of Justice.

This Court has the basic power to review by way of a Petition for Writ of Mandamus fundamental and basic questions affecting the administration of criminal procedure under the Federal system and in particular where a respondent, as in this case, is indicted on heresay testi-

mony coupled with a lack of a written transcript of the proceedings before a Grand Jury. It is, thus, our position that the procedure followed in this case represents a basic fault in the administration of criminal procedure under the Federal system and that this procedure should be reviewed by this Court and held to be highly improper, in violation of the legal and constitutional rights of a citizen of this country.

I.

LAW IN SUPPORT OF MANDAMUS TO COMPEL A DISMISSAL BY THE DISTRICT JUDGE OF THE INDICTMENT RETURNED IN THIS CASE.

Petitioner is accused of willfully failing to report as income certain monies given to him by his friend, Harry Mutter. In such case; the only persons with direct knowledge of the facts would be the Petitioner and Harry Mutter. Although both were available to testify and although the Petitioner offered to testify, the government apparently decided to present the case to the Grand Jury through the mouth of an agent or some other person lacking in first hand information. The unsurprising result of this procedure was that Richard R. Shalla was indicted for tax evasion.

Before turning to a discussion of what type of evidence should or should not be allowed before a Grand Jury, it is necessary to understand just what purpose the Grand Jury serves. The Grand Jury is an institution which we have inherited from England along with the common law. The founding fathers of our Constitution thought so highly of the Grand Jury system as to make it a part of the Bill of Rights. The historical function of the Grand Jury is primarily to assess the likelihood of prosecutorial suc-

cess. Thus, the Grand Jury is in effect a screening agency which hears testimony and applies the common sense of the community to each case to determine whether or not the person under investigation is likely to be convicted. It need hardly be added that the proceedings before the Grand Jury must be such as will best allow the Grand Jurors to correctly "screen" cases.

The adverse effect which the use of hearsay evidence in the place of available direct evidence has upon the Grand Jury system is well recognized. *United States v. Arcuri* (E.D. NY ,1968), 282 F. Supp. 347; *United States v. Umans* (CA 2, 1966), 368 F. 2d 725; *United States v. Gramolini* (1969), 301 F.Supp. 39. In fact, the lack of trustworthiness inherent in the use of solely hearsay evidence promoted the inclusion in so ancient and respect a document as the Magna Charta the following language—"No bailiff from henceforth shall put any man to his law upon hs own bare saying, without creditable witnesses to prove it." Sec. 38.

In *United States v. Arcuri*, supra, the defendant was indicted for passing counterfeit bills. Although a number of agents of the Treasury Department participated in the infestigation and arrest, a government agent, without any personal knowledge of the events was the only witness to testify before the Grand Jury.

In discussing this problem, the Court said that the practice of relying on hearsay is pernicious because:

> "It habituates the Grand Jury to rely upon 'evidence' which appears smooth, well integrated and consistent in all respects. Particularly because neither cross-examination nor defense witnesses are available to them, Grand Jurors do not hear cases with the rough edges that result from the often halting, inconsistent and incomplete testimony of

> honest observers of events. Thus they are unable to distinguish between prosecutions which are relatively strong and those which are relatively weak. All cases are presented in an equally homogenized form. A Grand Jury so conditioned is unable to adequately serve its function as a screening agency. It cannot exercise its judgment in refusing to indict in weak cases where, technically, a prima facie case may have been made out. It is, moreover, unlikely to demand additional evidence."

The same sentiment was echoed by Judge Waterman in *United States v. Umans*, supra, 730:

> "* * * excessive use of hearsay in the presentation of government cases to the Grand Jury tends to destroy the historical function of Grand Juries in assessing the likelihood of prosecutorial success and tends to destroy the protection from unwarranted prosecutions that Grand juries are supposed to afford to the innocent. Hearsay evidence should only be used when direct testimony is unavailable or when it is demonstrably inconvenient to summon witnesses able to testify to facts from personal knowledge."

The trend evidenced by the two cases quoted above is not limited to the second circuit only. Spurred on by the obvious contradiction between the use of hearsay when direct evidence is readily available and the expectation that the Grand Jurors will correctly predict prosecutorial success, the first circuit has spoken out thusly:

> "In *United States v. Costello*, 350 U.S. 359, 76 S. Ct. 406, 100 L.Ed. 397 (1956), the Supreme Court temporarily laid to rest the controversial issue of whether indictments could be based exclusively on hearsay evidence. In *Costello* the Court seemed to choose a rationale intended to avoid dilatoriness in grand jury proceedings. In a concurring opinion,

> Justice Burton criticized the majority for stating its rationale too broadly and hence inviting prosecutorial practices of questionable validity to be used in subsequent grand jury proceedings. In the twelve years since the decision in *Costello*, the breadth of that rationale has considerably been narrowed by decisions of the lower federal courts, particularly in the Second Circuit where it is now established that the deliberate use of hearsay alone to obtain indictments is unlawful where first-hand testimony was readily and conveniently available to the prosecution. *United States v. Arcuri*, 282 F. Supp 347 (E.D. N.Y. 1968), 405 F. 2d. 691 (2nd Cir. 1968). However, the First Circuit has not as yet stated a position with respect to the use of hearsay. And it is clear that the practice in this district has been to use hearsay before the grand jury. Nevertheless, for the reasons stated in the *Arcuri* decision, and the cases therein cited, I am constrained to declare that the deliberate use of hearsay testimony alone to obtain indictments is a questionable practice which so seriously depreciates the function of the grand jury as a fact investigator and determiner of probable cause as to suggest a watering down of the grand jury contemplated by the Fifth Amendment. It is my opinion, in cases such as this, where the evidence is not voluminous and where first-hand evidence is readily and conveniently available, that hearsay evidence cannot be the sole evidence presented to the grand jury." *United States v. Gramolini* (1969), 301 F. Supp. 39, 42, 43.

The *Arcuri* case, the *Umans* case and the *Gramolini* case serve to illustrate the increasing recognition of the serious infringement that the prosecutorial practices present in this case make upon the constitutional right of the Defendant to have his case passed upon in the type of grand jury proceedings contemplated by the Fifth Amendment. The Defendant is virtually deprived of any chance of win-

ning at the indictment stage of the prosecution and the grand jury proceedings become a mere formality. Those who would argue that the infringement upon the Defendant's rights is not serious because the handing down of an indictment is not a final disposition of the case and is not the equivalent of a conviction are ignoring the realities of the time, expense, and embarrassment incident to the defense of a criminal charge.

Furthermore, it can easily be seen that the danger in permitting these practices is all the more serious when the government can increase its already overwhelming advantage by the simple expedient of not informing the grand jury that they are being given merely second-hand information. It was this very danger that sparked the following dissent by Judge Friendly in *United States v. Payton*, 363 F. 2d. 996, 999, 1000 (1966):

> "The course followed by the government in this case makes a mockery of the Fifth Amendment's guarantee that 'No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.' What compromises this indictment is not that the grand jury heard only hearsay testimony as in *Costello v. United States*, 350 U.S. 359, 76 S. Ct. 406 (1956), but that, in sharp contrast to that case, it had no way of knowing that the testimony which was all it was hearing was hearsay.
>
> "If, in these narcotics peddling cases, the Government insists on pressing Costello to the point of offering a grand jury only hearsay testimony by a surveilling agent when there is no apparent reason save a transparently unworthy one for not producing the agent with firsthand knowledge, it must make clear to the jurors the shoddy merchandise they are getting so they can seek something better if they wish; thus pressing the prosecutor for more

reliable evidence—particularly important in these narcotics prosecutions where there is often a problem of the reliability of an agent's identification is the grand jury's historic function. In the Costello case, there was excellent reason for limiting the presentation to the three agents who summarized financial evidence, proof of which required 141 other witnesses and 368 exhibits at the trial, and the agent's lack of direct knowledge must have been apparent. The statement in Mr. Justice Black's opinion, 'An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its fact, is enough to call for trial of the charge on the merits', 350 U.S. at 363, 76 S.Ct. at 409, could never have been meant to validate anything like what happened here; on the contrary, I am convinced that if Costello had presented facts like these, the Court would have dismissed the indictment on the ground, stated by Mr. Justice Burton, that '[t]o hold a person to answer to such an empty indictment for a capital or otherwise infamous federal crime robs the Fifth Amendment of much of its protective value to the private citizen.' 350 U.S. at 364, 76 S.Ct. at 409 (concurring opinion.) Fully recognizing the undesirability of a practice whereby 'before trial on the merits of a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury,' 450 U.S. at 363, 76 S.Ct. at 409, I nevertheless think a proper respect for the constitutional requirement of indictment and the 'high place' held by the grand jury 'as an instrument of justice,' 350 U.S. at 362, 76 S.Ct. 406, forbids our sanctioning what happened in this case. When it becomes clear in the course of trial that the evidence on which the grand jury indicted was entirely hearsay, the government must at least satisfy the court that the grand jurors knew this was all they were hearing. The Government did not do that here;

> Ward's trial testimony that he had told the grand jury he was answering 'upon reports that had been furnished' him cannot overcome the record that he said nothing of the kind. I would reverse and direct dismissal of the indictment."

See also *United States v. Russo* (CA2, 1969), 413 F.2d. 432; *United States v. Gramolini*, supra; *United States v. Beltram* (CA2, 1968), 388 F.2d 449 (Dissent per Medina, J.)

It thus becomes clear that the type of practice engaged in by the government in the instant case prevents the jury from accurately assessing probable cause and from performing the function that they were intended to perform.

Another evil which inheres in the unnecessary use of hearsay is that the accused is prejudiced at the trial of the case, because he cannot use grand jury testimony to cross-examine witnesses. Even where the government furnishes the defendant with a copy of the grand jury minutes, he is at a great disadvantage, since the government will likely use different witnesses at trial than were used before the grand jury. Witness the following vigorous dissent by Judge Medina in *United States v. Beltram*, 388 F.2d. 449, 451, 452 (1968):

> "Of even greater significance, in my opinion, is the evil practice, especially in narcotics cases, of using before the grand jury only a peripheral witness, who recites in more or less narrative fashion what other narcotics agents have seen, heard or done. The key witness, in this case, Scott, is not produced; nor is the grand jury told in any intelligible way that the principal witness to the commission of the crimes has not been produced. The inevitable consequence of this procedure is to make it impossible for the defense, by demanding production of the grand jury minutes at the trial, to

use contradictions and misstatements of the principal witness under oath to impeach him.

"I remember the days when it was like pulling teeth to get a federal judge to hand over grand jury minutes to defense counsel for purposes of cross-examination. But those times have passed and, in a more enlightened age, it is thought more consistent with the accused's right to defend himself to permit his counsel, generally as a matter of course, at least in this Circuit, to see the grand jury testimony of trial witnesses for the prosecution and to permit the use on cross-examination of these witnesses of such parts of the grand jury testimony as counsel deems to be contradictory. What is the use of such a practice, established in the cause of truth and justice, if the prosecutor can in effect return to the old system by the simple expedient of withholding key witnesses from the grand jury hearing?"

See also *United States v. Arcuri*, supra.

Since the adverse effects of the practices which occurred in the present case on the functioning of the grand jury system are manifest, the only question which remains is whether this Courts' decision in *United States v. Costello*, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956), can be interpreted as approving what happened here. We respectfully submit that it cannot.

The *Costello* case, like the case at bar, was a tax evasion case. Quite significantly, however, there the government was attempting to prove the defendants guilty by the "net worth" method; that is, by establishing the taxpayer's net worth at the beginning of the period upon which the indictment was based, and attributing subsequent increases, less tax deductions and amounts reported for tax purposes, to unreported taxable income. Where the net worth method is used, the evidence, of necessity, must be indi-

rect, since the government need not and usually cannot prove the source of the unreported income. Another aspect of the net worth method is that the number of witnesses and exhibits involved is frequently so great that it is extremely impractical to put them all before the grand jury. In *Costello*, the only witnesses before the grand jury were three government agents who summarized the findings of their investigation. At the trial the government called 144 witnesses and introduced 368 exhibits. The Supreme Court could not require the government to have produced direct testimony at the grand jury proceedings without doing away with net worth prosecutions entirely. Accordingly, the Court approved the use of hearsay.

In direct contract to the *Costello* case is the present case. The Defendant to be sure has been indicted for the same crime, but there the similarity ends. The government is not attempting to prove the crime through the net worth theory. Rather, it has based its prosecution on the receipt of a specific amount of income from a specific source. Nor is the government confronted with an unwieldly number of witnesses. The only witness with direct knowledge of the facts are Richard R. Shalla and Harry Mutter. Finally, the government has no reason to withhold the testimony of Richard R. Shalla and Harry Mutter as that testimony would certainly not be voluminous. The sole purpose served by the use of hearsay before the Grand Jury in the present situation is to insure that the Defendant would be indicted.

The holding in *Costello* has, as feared by Mr. Justice Burton in his concurring opinion, been stretched far beyond the facts of that case to the point where unfair prosecutorial conduct, not contemplated by the court, is sanctioned. It is clear that indictments based solely on hear-

say are valid where the government has no other choice on the ground that the interests of society are better served by allowing hearsay indictments than by allowing a person to escape prosecution due to unfortunate circumstances not the fault of the government. But it should be equally clear that hearsay is not an acceptable substitute for readily available direct evidence. The recent judicial thought on this question, especially in the first and second circuits, is that the holding in *Costello* should be limited to its facts, i.e., situations where hearsay evidence is all that is practically available. To give any broader scope to the *Costello* rule is to deprive the Fifth Amendment's guarantee of indictment by a grand jury of all meaning. It is difficult to conceive how the Fifth Amendment can serve the purpose for which it was ordained—to protect an accused from oppressive government—when the law allows practices which make of the grand jury proceedings a mere formality.

For the foregoing reasons, the Petitioner urges that the indictment in this case is fatally defective and requests that mandamus issue.

II.

ADDITIONALLY MANDAMUS SHOULD LIE AS THE BASIS OF THE MOTION TO DISMISS THE INDICTMENT BECAUSE NO TRANSCRIPT OR RECORD WAS MADE OF THE GRAND JURY PROCEEDINGS.

The Petitioner is informed and believes that no transcript was made of the grand jury proceedings which resulted in his indictment. Assuming that this is true, Petitioner contends that the lack of a transcript is fatal to the indictment.

Although there is as yet no mandatory requirement of transcription[1] it is the Petitioner's contention that fundamental fairness and due process require that a record be made in all cases. Despite the lack of any mandate in the Federal rules, it has been recognized in the case law that at the very least the keeping of grand jury minutes is the better practice. *United States v. Cianchetti*, (CA 2, 1963), 315 F.2d 584; *Schlinsky v. United States*, (CA 1, 1967), 379 F.2d. 735. Furthermore, many courts, recognizing the advantages to be gained from the keeping of grand jury minutes, have taken the initiative of ordering recordation on their own motion.

Perhaps the leading case in this area is *United States v. Gramolini* (1969), supra. There, the Defendant was indicted for conspiracy to misapply the funds of a federal savings and loan association. No transcript was made of the grand jury proceedings and on appeal the Defendant

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[1] It is noteworthy that the American Bar Association's Committee on Federal Rules and its Criminal Law Section have recommended the mandatory transcription of grand jury proceedings:

"Rule 6 (The Grand Jury). After careful study, described below, the Section of Criminal Law and this Committee recommend that:

"(1) Rule 6(e) of the Federal Rules of Criminal Procedure be amended to provide that a reporter transcribe the minutes of all proceedings in grand jury which are accusatorial in nature; that the cost of such transcript be borne by the government of the United States and the proceedings in transcribed form be filed in a sealed envelope with the appropriate United States District Court for further necessary action;

"(2) Similar action be taken either by changes in the rules of court or by necessary legislation in the several states which follow the common law practice described herein;

"(3) After an indictment has been returned against a Defendant, and after his arrest, that a copy of the grand jury minutes or transcript be furnished to him as a matter of right, upon his request prior to his arraignment or as soon thereafter as is practicable; except in cases where the government reveals that national security or public interest is involved, in which event grand jury proceedings shall not be disclosed without an order of the court. 38 FRD. 95, 106".

claimed that the lack of a transcript was reversible error. In discussing this problem the Court said at page 41, 42:

> "'Professor Cipes has well stated the current situation regarding grand jury minutes:
>
> "There is no requirement that testimony before the grand jury must be transcribed verbatim, although this is acknowledged to be the better practice. Fairness to the defendant would seem to compel a change in the Rule, particularly in view of the increasingly permissive use of minutes for impeachment. The requirement of a record may also prove salutary in controlling overreaching or improper examination of witnesses by the prosecutor.
>
> "8 Moore's Federal Practice at paragraph 6.02(2), p. 6-11 (Cipes ed. 1969). To these comments I can add certain thoughts derived from my own experience. In eighteen years of practice as a prosecutor, I presented to both state and federal grand juries hundreds, even thousands of cases, covering every facet of crime, from petty offenses to organized activities of the underworld, from voting frauds to alleged graft and corruption of power-wielding city officials. In not a single major instance were minutes not kept either electronically or manually. Against this background, I unequivocally reject the notion that recordation of grand jury proceedings interferes with the proper functioning of the grand jury. In no way does recordation inhibit the grand jury's prosecutorial practices which might, in its absence be used, but that is no reason not to record. Indeed, a sophisticated prosecutor must acknowledge that there develops between a grand jury and the prosecutor with whom the jury is closeted a rapport—a dependency relationship which can easily be turned into an instrument of influence on grand jury deliberations. Recordation is the most effective restraint upon such potential abuses. Nor can it be claimed that the cost

of recordation is prohibitive; in an electronic age, the cost of recordation must be categorized as miniscule. Indeed, even if a stenographic transcript be kept, the cost is clearly justified by the improved administration of criminal justice. For these many reasons, I rule as a matter of federal criminal procedural law pursuant to Fed. R. Crim. p. 57(b)[2] that it is the law of this case grand jury proceedings should have been transcribed or otherwise equally effectively recorded.

"In the instant case, the keeping of grand jury minutes would obviously have materially aided defense counsel in his attempt to ascertain the existence of or extent of the prosecutorial bias and prejudice he alleges existed in the presentation of the case exclusively by hearsay to the grand jury. In the absence of minutes, the defense is forced to conjecture as to what was stated and can only reconstruct the events before the grand jury by an adversarial confrontation, in a preliminary hearing, with the government's witness or by examination of the members of the grand jury. Neither means is as adequate to the task as would the keeping of minutes have been."

---

[2] Rule 57 provides:

"(a) Rules by District Courts and Courts of Appeals. Rules made by district courts and courts of appeals for the conduct of criminal proceedings shall not be inconsistent with these rules. Copies of all rules made by a district court or by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts. The clerk of each court shall make appropriate arrangements, subject to the approval of the Director of the Administrative Office of the United States Courts, to the end that all rules made as provided herein be published promptly and that copies of them be available to the public.

"(b) Procedure not Otherwise Specified. If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute. As amended Dec. 27, 1948, eff. Oct. 20, 1949."

The *Gramolini* court went on to hold that every indictment handed down after the effective date of the opinion would be vulnerable to attack if the grand jury proceedings had not been transcribed or otherwise effectively recorded.

The list of possible abuses cited in the *Gramolini* case which recordation would discourage, while not exhaustive, is sufficient reason to hold that fairness to the Defendant requires the keeping of minutes. Indeed, the task of holding the government accountable for its actions is at the very base of an enlightened system of criminal justice. This task is not easily accomplished where events in question must be reconstructed out of the frailty of man's memory. Where there is no check upon the government because of failure to record the grand jury proceedings, the temptation is great for the over-zealous prosecutor to impose his will upon the jurors in a way that might not be otherwise attempted.

In any event, even where the government's conduct is above reproach, the Defendant cannot effectively impeach witnesses at trial with their grand jury testimony where it has not been recorded. In fact, any attempt at impeachment in this manner invites equivocation and at the very least will result in a delay of the trial while it is attempted to be determined exactly what was said before the grand jury.

In conclusion, the pitfalls for the defendant inherent in the failure to record the grand jury proceedings are painfully obvious. In view of the increasing disfavor into which this practice is falling, it is only a matter of time before recordation is a mandatory requirement in all circuits. The Petitioner urges that this Honorable Court declare under its rule-making power set forth in 57(b) of the Federal Rules of Criminal Procedure, that recordation is necessary to a valid indictment.

At this point, we wish to comment on the opinion of the Trial Court when it made the following statement:

> "Moreover, the Court feels bound by the decisions of the Sixth Circuit Court of Appeals, as, of course, I must be; and more specifically the case of *United States against Barnes*, reported at 313 Federal Second 325. That was a criminal action for tax-evasion, and the Court affirmed the denial of a motion to dismiss on the same grounds as alleged here, basing its decision on *Costello*".

We have examined the case cited by the Trial Judge and it is our contention that no Court has in any way passed upon the grievous questions raised with regard to the use of hearsay testimony and, therefore, the Trial Judge's reliance upon the *Barnes* case is not well founded. It is important to know that in the *Barnes* case the motions filed were based upon conclusion, however in the present case the motions filed are based upon Affidavits of counsel which stated the undisputed facts that only hearsay evidence was presented to the Grand Jury when direct testimony was available. That even if the *Barnes* case could be construed to be deciding this question, it certainly did not decide the legal or factual issues presented to this Honorable Court in the present case.

We are mindful of the Sixth Circuit's decision in *United States v. Hensley*, 374 F.2d. 341, on this question of the failure to transcribe Grand Jury minutes, but we respectfully contend that in light of the unusual nature of the proceedings here, to-wit: the use of hearsay evidence only when direct evidence was available plus the failure to transcribe the proceedings of the Grand Jury, we respectfully request this Court to review the holding in the *Hensley* case, supra, for the reasons above stated.

Finally, we respectfully contend that the Trial Court had some doubt as to the legal wisdom in denying Petitioner's Motion to Quash when he said:

> "That is not to say, either, that this Court is ready to condone the practice of producing only hearsay testimony; perhaps even more particularly in a case of this nature.
>
> "Nevertheless, the Sixth Circuit has spoken on the subject, and the Court is required to follow that direction."

RELIEF REQUESTED

For the foregoing reasons, Petitioner respectfully prays that a Writ of Mandamus issue as presented herein directing the United States District Court and its Judges, and in particular, Judge Pratt, to grant Petitioner's motion to quash the indictment.

Respectfully submitted,

LOUIS J. COLOMBO, JR.
Attorney for Petitioner
Richard Shalla
1500 N. Woodward Avenue
Suite 209
Birmingham, Michigan 48011
645-9300

Dated: January 24, 1972

APPENDIX

APPENDIX "A"

(U.S. District Court—Eastern District of Michigan—Southern Division)

United States of America, *Plaintiff,* vs Richard R. Shalla, *Defendant.*	Vio: Section 7201 Title 26 United States Code No. 45,693

MOTION FOR DEFENDANT TO DISMISS THE INDICTMENT

The Defendant moves that the indictment be dismissed on the following grounds:

1. That the United States presented solely hearsay evidence before the Grand Jury which handed down the above indictment even though direct evidence was readily available.

2. That there was no transcript made of the Grand Jury proceedings.

LOUIS J. COLOMBO, JR.
Attorney for Defendant
1500 N. Woodward, Suite 209
Birmingham, Michigan 48011
645-9300

Dated: September 23, 1971.

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS THE INDICTMENT

(U.S. District Court—Eastern District of Michigan—Southern Division)

Louis J. Colombo, Jr., first being duly sworn, deposes and says:

1. That he is the attorney for the Defendant, Richard R. Shalla in the above entitled cause against whom indictment No. 45,623 charging the Defendant with violation of Title 26 of the United States Code, Section 7201, was filed in the Eastern District of Michigan.

2. That he has reason to believe that the only testimony presented before the Grand Jury upon which the indictment of Richard R. Shalla in the present action was returned was based solely upon hearsay.

3. That he has been advised and knows of his own knowledge that Richard R. Shalla did offer orally and in writing, to appear as a witness before the Grand Jury prior to his indictment but that same was declined by the United States.

4. Deponent further states that he was advised and informed that Harry Mutter was at all times available as a witness to appear before the Grand Jury but that he was not called as a witness.

5. That it is the claim of the United States that Richard R. Shalla did receive certain monies from one Harry Mutter and that said monies constituted taxable income.

6. That it is the position and claim of the Defendant that the money passing between himself and Harry Mutter was a non-taxable gift.

7. That the only two persons with direct knowledge of the facts are Harry Mutter and Richard Shalla and that although both were available as witnesses, the United States declined to use either of them.

8. Deponent further states that the only witness appearing before the Grand Jury was an Internal Revenue agent named Daniel J. Kozlowski and that of necessity agent Koslowski's testimony could only be hearsay.

9. Deponent further states that, based upon the files and records in this cause and upon information and belief there was no written transcript or recording made of the proceedings before the Grand Jury.

Further deponent sayeth not.

LOUIS J. COLOMBO, JR.
Attorney for Defendant
1500 N. Woodward, Suite 209
Birmingham, Michigan 48011
645-9300

Subscribed and sworn to before me this 23rd day of September, 1971.

Christine Olsen,
Notary Public, Oakland County, Michigan
My Commission Expires August 25, 1975

APPENDIX "B"

(U.S. District Court—Eastern District of Michigan—Southern Division)

United States of America,
Plaintiff,
vs
Richard R. Shafla,
Defendant.

No. 45,693

RULING ON MOTION TO DISMISS

Detroit, Michigan
November 7, 1971

Before the Honorable Philip Pratt, U.S. District Judge, at Detroit, Michigan, November 7, 1971.

Appearances: Loren Keenan, Assistant United States Attorney, appearing on behalf of the Plaintiff; Louis J. Colombo, Jr., appearing on behalf of the Defendant; Roy Luxton, Court Reporter.

The Court: This matter came before the Court in another fashion, and the Court has ruled previously on the motions. Now, however, the form of motions go to a dismissal of an indictment based, first, on the ground that the indictment was based on hearsay evidence given to the grand jury and, secondly, that no minutes of grand jury proceedings were recorded.

With regard to the first issue, and that is, should the indictment be dismissed because it is based on hearsay; the general rule throughout the United States has been that a grand jury indictment may be based on hearsay.

And the leading case in that area—as mentioned by Mr. Colombo in his oral argument—was Costello against the United States, 350 U.S. 359.

That is not to say, however, that there has been uniformity, because of certain cases, particularly in the Second Circuit. However, these cases have not been followed, not even in the Second Circuit; and certainly not in the Sixth.

Gramolini, for example, in 301 Federal Supplement 39, a district court case in the First Circuit, was not followed. And our research has been unable to produce any case that has been dismissed in that district or any other district under Gramolini or the Emans case.

Moreover, the Court feels bound by the decisions of the Sixth Circuit Court of Appeals, as, of course, I must be; and more specifically the case of United States against Barnes, reported at 313 Federal Second 325. That was a criminal action for tax evasion, and the Court affirmed the denial of a motion to dismiss on the same grounds as alleged here, basing its decision on Costello.

That is not to say, either, that this Court is ready to condone the practice of producing only hearsay testimony; perhaps even more particularly in a case of this nature.

Nevertheless, the Sixth Circuit has spoken on the subject, and the Court is required to follow that direction.

With regard to the issue of recording the grand jury minutes, again there is no question but that the better practice is to record the grand jury minutes so the defense has the availability at time of trial for purposes of cross-examination.

The most recent case on the subject is from the First Circuit, in the United States against Montijo, 424 Fede-

ral Second 207, a 1970 case, in which the Court states, at page 210:

> "Defendant also argues that we should exercise our supervisory power to reverse his conviction on the ground that the grand jury proceedings were not recorded and were therefore unavailable for the cross-examination of a key Government witness. We are not prepared to take such a step at this time."

The language indicates, of course, that it is a matter that has been considered very carefully and thoroughly not only by the First Circuit but by others. And as yet, there is no inclination to take that step which would require the recording of all grand jury minutes.

The Court, certainly, in that instance, was familiar with the Gramolini case—as a matter of fact, cites it in a footnote.

The Sixth Circuit has also spoken to the subject; and again of course, this Court is bound by the decisions of the Sixth Circuit. More specifically, in the United States against Hensley, 374 Federal Second 341, writ of certiorari denied by the United States Supreme Court in 388 U.S. 923. The Court, in Hensley, at page 352, spoke as follows:

> "We agree with the Second Circuit that having a stenographer present to transcribe the testimony given before the grand jury would be better procedure but that such a transcript is not a Constitutional requirement."

Bearing in mind that case also the Dallago case from this District, 312 Federal Supplement 249, and the excellent discussion of Judge Van Pelt Bryan in United States

against Missitte, at 324 Federal Supplement 334, the Court cannot accept the argument of Counsel with respect to the recording of grand jury minutes.

For the reasons given, then, the Court will deny the motion.

* * *

Certification

I, Roy Luxton, Official Court Reporter, hereby certify that the foregoing transcript of the Ruling On Motion To Dismiss, in the case of United States of America vs Richard R. Shalla, taken before the Honorable Philip Pratt, U.S. District Judge, at Detroit, Michigan, November 7, 1971, is a true and correct transcription of my stenotype notes.

Roy Luxton
Official Court Reporter
U. S. District Court

Dated: Detroit Michigan, November 8, 1971.

APPENDIX "C"

UNITED STATES DISTRICT COURT
Eastern District of Michigan
Southern Division

United States of America, *Plaintiff*, vs Richard R. Shalla, *Defendant*.	Criminal No. 45693

ORDER DENYING DEFENDANT'S MOTION TO DISMISS INDICTMENT

At a session of said Court, held in the Federal Building, Detroit, Michigan November 9, 1971.

Present: Honorable Philip Pratt, United States District Judge.

A Motion to Dismiss Indictment having been filed on behalf of the defendant, Richard Shalla, and the Court having studied briefs submitted by both sides, and having heard oral argument, and

The Court having orally denied the Motion from the bench on November 8, 1971;

It is Hhereby Ordered that the Motion to Dismiss Indictment filed on behalf of the defendant be and hereby is denied.

Philip Pratt
United States District Judge

APPENDIX "D"

UNITED STATES COURT OF APPEALS
for the Sixth Circuit

Richard R. Shalla, Petitioner, vs. Honorable Philip Pratt, United States District Court, Eastern District of Michigan, Respondent.	File No. 71-1998

RESPONSE TO PETITION FOR WRIT OF MANDAMUS

Without addressing itself to the procedural propriety of a petition for a writ of mandamus to vacate a pretrial ruling denying a motion to dismiss an indictment, the Respondent herein respectfully submits certain additional rulings by way of clarification and amplification.

As indicated in its Ruling on Motion to Dismiss of November 7, 1971, Respondent had a similar motion presented in the same case and a ruling was made on August 9, 1971. A transcript of the hearing and ruling is attached hereto.

As indicated in its ruling of August 9, 1971, counsel and the Court referred to an opinion entered by Respondent in another case but on the same issue. A copy of that Memorandum Opinion is also attached.

The additional material is submitted so that the Court may have before it the pertinent arguments and rulings

referred to in the transcripts so as to avoid any confusion and to present the background of the contested ruling.

Respectfully submitted,

Philip Pratt
United States District Judge

Dated: December 7, 1971.

Proceedings on Motion

Proceedings had in the above-entitled matter before the Honorable Philip Pratt, District Judge, at Detroit, Michigan, August 9, 1971.

Appearances: Loren Keenan, Assistant United States Attorney Appearing on behalf of the Plaintiff, Louis J. Colombo, Jr. Appearing on behalf of the Defendant.

Detroit, Michigan
August 9, 1971

Proceedings

The Clerk: Calling case number 45693, United States versus Richard R. Shalla.

Mr. Colombo: For the record, my name is Louis J. Colombo, Jr. and I appear here this morning on behalf of Richard R. Shalla, the respondent in this case.

If it please the Court; this is a motion which is brought under Rule 6(e) of Federal Rules of Criminal Procedure.

I should like to make a very brief statement of the factual background of this matter so this motion will be more apparent to the Court.

On March 16th of this year, our client, Richard Shalla, was indicted by a Federal Grand Jury, sitting in this Dis-

trict, on four counts of income tax evasion, in violation of 26 U.S.C.A. 2701.

It is charged in that indictment that the defendant willfully failed to report his income certain monies given to him by one Harry G. Mutter in the years '64 through '68.

If it please the Court, it is our position, in defense of this case, that the monies that were given to Mr. Shalla were not income but were a gift.

We are bringing this motion for the purpose of ascertaining the nature of the evidence that was presented before the Grand Jury. Because, as you will find in the affidavit, my affidavit, which is undenied here, it is our position that the only evidence that was used was hearsay, when direct testimony was available to that Grand Jury.

Now, we have submitted a brief in support of the proposition that under 6(e) we are entitled to this information as a basis of a substantive motion to be made to this Court to quash the indictment.

I won't read Rule 6(e) in its entirety, but the pertinent portion of it is underlined in our brief.

Rule 6(e), of course, relates to matters before the Grand Jury and certain prohibitions against any disclosure.

However, the rule provides as follows:

> "Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before grand jury only when so directed by the court preliminary to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist"—may exist—"for a motion to dismiss the indictment because of matters occurring before the grand jury."

Now, if it please the Court, we have cited cases. I am sure you are familiar with the general trend of the law today with reference to the disclosure of Grand Jury matters. As you know, the Courts have recently taken a liberal trend in this area, and properly so. And the trend of the thinking in these cases is that disclosure rather than suppression of the evidence tends to the orderly and proper administration of criminal justice.

That principle was first enunciated in Jencks and then in Dennis and in cases which we cite in our brief.

It boils itself down to this; that where the traditional reasons for secrecy no longer exist—and we contend they no longer exist here—or where the reasons for maintaining the secrecy are minimal—and we maintain they are minimal—for the necessity of having a sound basis for motion to dismiss, that the grounds for secrecy as for as finding out what occurred before that Grand Jury with respect to the nature of evidence, the secrecy provisions are gone.

Of course, the Court is familiar with those rules as far as secrecy to protect the witnesses and so on. They are gone here, there is no reason for them.

Now, to get down to the heart of this matter and the reason I have brought this. I am familiar with this Court's prior decision of a motion to quash which was predicated on the so-called hearsay indictments, and there was a section in the Court's opinion that disturbed me, and I don't want to have that problem here.

Your Honor, in your opinion stated, "How would the defendant know that it was hearsay?"

I have been informed, and my affidavit so states, that the only evidence presented against our client was hearsay.

Now, very briefly, the fact of the matter, this is an unusual situation, there are only two persons who have direct knowledge of what occurred here, one is the respondent.

And for the record, I, in writing and orally, offered Mr. Shalla to the Grand Jury as a witness and that request was denied.

I have also stated under oath, in my affidavit that Harry Mutter, the other party to this transaction, was available to give testimony to that Grand Jury.

I am also informed that the only witness who was taken before the Grand Jury in support of this indictment was a Government Agent by the name of Kozlowski.

Now, obviously, in our opinion that testimony could be hearsay only.

Now, what I want to know is whether or not that is the factual background, so there can't be any question about the posture in which we intend to submit a motion to quash here.

And, so, it is our position that we come very clearly within Rule 6 (e), which says the Court may order disclosure when the purpose is to file a motion to quash.

Now, I am fully cognizant of this Court's position on the hearsay question. But in this case, this case differs from any case that we have been able to find, in that direct evidence was available to the Government here and should have been presented to the Grand Jury as a basis for this proceeding against the respondent here.

Now, I am not going to argue that proposition here except to suggest to the Court's mind, that what I concerned about here is that this type of procedure violates

a basic principle of due process in this country, going back to the Magna Charta, which is the basis for our Bill of Rights and the subsequent provisions of the Constitution and I refer specifically to the proposition that no man shall be brought to the lay on the unverified testimony of a police officer. Now, that is what occurred here.

Now, if it please the Court, I submit, in all fairness, that we are entitled to a statement—if that is the proper way to approach it—from the District Attorney, because I am advised that no transcript of this Grand Jury was made. Therefore, I am asking this Court to direct the District Attorney to advise us of the names of the witnesses, the nature of their testimony, and whether or not that Grand Jury was advised that there was direct evidence available and it was not being used.

I respectfully submit that our position is in order. I am not going to burden the Court with reading the citations which we have here.

I have received—I was away over the weekend—this morning the answer to the motion. It is my position that the grounds that are set forth there are completely irrelevant. The District Attorney suggests that there is delay here. Well, there isn't any delay of any kind. And the respondent always has the right to file appropriate motions to protect his legal and constitutional rights.

Now, as far as what happens afterwards, that is neither here nor there. We have a duty and a responsibility to raise this question at this time. It is timely; it is appropriate. And may I respectfully say it should be granted.

Thank you.

Mr. Keenan: May it please the Court, the Government answer has been given to your Honor by way of our answer and a letter attached thereto.

I have nothing further to add to that answer. But I would be happy to answer any questions that your Honor may have.

It is our position, in essence, your Honor, that assuming for the sake of argument that everything that Mr. Colombo says is true, there still is no basis for a dismissal of the case with prejudice such that the Government could never bring another indictment against Mr. Shalla before another Grand jury. And, so, the relief that Mr. Colombo is asking for in effect seems to us to be one of interim relief only, in that I know of no case holding that where hearsay is used, that the indictment must be dismissed with prejudice and can never be brought again.

We think the law is clear that what may have occurred in this particular Grand Jury, and what I know from my experience has occurred in other cases before other Grand Juries, is adequate.

And, therefore, we ask that the defendant's motion be denied.

Mr. Colombo: May I reply very briefly?

The Court: Yes.

Mr. Colombo: May I suggest to the Court that the proposition which the District Attorney has just advanced here is not before the Court at this time. This is merely a motion to establish certain basic facts upon which the motion to quash may be predicated.

Thank you.

The Court: As has been indicated by Counsel, the Court has had this matter before it recently. The issue, of course, in the other matter involved the motion to quash on the ground that only hearsay evidence was used. Whereas, as I understand this motion, the defendant contends that he should be given access to the records of the

Grand Jury or also, a statement from the United States Attorney with respect to what occurred before the Grand Jury, in order to prepare a motion to quash—particularly if that disclosure indicates that only hearsay testimony was presented to the Grand Jury—and that, the testimony of an agent of the Government.

As a basis for the motion, defendant cites Rule 6(e), dealing with disclosures when a particular need is shown.

I think the threshhold issue is: assuming that only hearsay testimony was presented to the Grand Jury, would that be a basis for a dismissal or a quashing of the indictment?

There is a long and unbroken string of cases which hold that the Grand Jury may rely upon hearsay evidence even though better evidence and direct evidence may have been available at the time the Grand Jury was convened.

There is an exception, however, to that string and that exception was one made by the Second Circuit in, I think, two cases, but particularly in the case of U. S. against Arcuri, which was reported in 282 Federal Supplement 347. The Court in that case went so far as to say that:

> "A timely motion to dismiss an indictment handed down after March 31, 1968, will be granted without a showing of prejudice to defendant if it is clear that hearsay alone was deliberately relied upon when better evidence was readily available for presentation to the Grand Jury . . ."

To my knowledge there has been no other circuit that has followed that suggestion; nor as a matter of fact has the Second Circuit followed it—with the exception, as I say, if memory serves me, of one other case.

The argument presented at that time and accepted by the Second Circuit, involved the use of narcotics agents particularly as the sole witnesses before the Grand Jury: And the Second Circuit decided that the practice was unsavory—and perhaps that it is too strong a word—but, at least, improper, and handed down this edict.

But, again, the research has indicated that not even the Second Circuit has followed that direction.

And the Court feels bound by the prior cases in the Sixth Circuit which permit hearsay testimony alone regardless of whether there is better evidence available.

Having then decided that issue, there would appear to be no reason for disclosure of the minutes or records of the Grand Jury, since they would not form a basis for a dismissal or for quashing of the indictment.

The motion is therefore denied.

Mr. Colombo: May I make a statement?

The Court: Sure.

Mr. Colombo: This does not bar me from a subsequent formal motion to quash, I assume.

The Court: I would think not. I am merely denying your motion.

Mr. Colombo: For disclosure?

The Court: Right.

Mr. Colombo: Thank you very much.

Mr. Keenan: Thank you, your Honor.

Certification

I, Roy Luxton, do hereby certify that I recorded in stenotype the foregoing proceedings had in the matter of The United States of America versus Richard R. Shalla, on August 9, 1971, before the Honorable Philip Pratt, District Judge; and that the same was reduced to typewritten form under my supervision; and that the foregoing is a true, full and complete transcription of my stenotype notes.

/s/ Roy Luxton
Official Court Reporter

Dated: August 9, 1971 Detroit, Michigan

MEMORANDUM OPINION

United States of America
Plaintiff
v.
Donald Dawson, et al.
Defendants

Criminal Action No. 45280.

(U.S. District Court—Eastern District of Michigan—Southern Division)

On December 4, 1970, defendant Jack Anthony Lucido filed a motion to dismiss. The motion was argued before this Court on March 30, 1971. Defendant Lucido sets forth essentially two arguments in support of his motion. First, it is argued that the time lapse between the alleged violations and the date of indictment resulted in a denial of due process of law. Second, it is argued that the indictment should not stand because it is alleged to be based on hearsay. The arguments will be considered in the order presented.

The Court is aware that in certain circumstances a delay between the alleged offense and the indictment for that offense can result in a denial of due process. Mere delay, however, does not effect such a denial. There also must be a showing of prejudice to the defendant. There is no such showing in this case. The defendant presents no facts or compelling circumstances which show prejudice.

Because of the very nature of the case—conspiracy—a delay between the alleged acts and the indictment is understandable. A period of weeks or months may be necessary to determine the scope of the alleged conspiracy, the number of co-conspirators, and their respective involvement. The argument concerning delay is without merit.

Likewise, the argument alleging that the indictment is based on hearsay is without merit. The defendant cannot know that the indictment is based solely on hearsay. Moreover, even if the indictment is based on hearsay, it is not rendered invalid: The Supreme Court specifically ruled in *United States v. Costello*, 350 U.S. 359, 362 (1956), that an indictment is not invalid merely because it is based on hearsay.

The Court is aware of a series of cases from the Second Circuit indicating that "hearsay indictments" would be dismissed when better evidence was available or when the grand jury was misled by hearsay information. *United States v. Umans*, 368 F.2d 725 (2nd Cir. 1966); *United States v. Azzari*, 282 F. Supp. 347 (E.D. N.Y. 1968), aff'd 405 F.2d 691 (2nd Cir. 1968), cert. den. 395 U.S. 913. However, the Second Circuit to date has not dismissed an indictment based on hearsay. In short, the so-called "Umans rule" allows departure from the holding in *Costello, supra*, only in the Second Circuit and only on facts not in evidence here.

For the above reasons, defendant Lucido's motion to dismiss is denied.

Philip Pratt
United States District Judge

Dated: April 30, 1970.

U.S. District Court
Eastern District of Michigan—ss.

I hereby certify that the foregoing is a true copy of the original on file in this court and cause.

Frederick W. Johnson, *Clerk*
By D. M. Cassell, *Deputy Clerk*

Dated: .....

APPENDIX "E"

United States Court of Appeals—Sixth Circuit

Richard R. Shalla, *Petitioner,* vs. The United States District Court For the Eastern District of Michigan and the Honorable Philip Pratt, *Respondents.*	#71-1998

RESPONSE TO PETITION FOR WRIT OF MANDAMUS

I.

On August 19, 1971, a hearing was held before Judge Pratt on Shalla's motion for disclosure of grand jury proceedings under F.R.Cr.P. 6(e). As part of the Govern-

ment's answer, a letter dated July 2, 1971 and labeled Attachment 1 was submitted. (Attachment 1 also contains the proposed stipulations referred to in that letter.) Motion for disclosure was denied for the reasons stated in Attachments 2 and 3. (Attachment 3 is a Memorandum Opinion by Judge Pratt in another case upon similar facts.)

On November 8, 1971, the petitioner argued a motion before Judge Pratt to dismiss the indictment upon the *assumed* factual situation that only hearsay testimony was heard by the grand jury and that there was no transcript of the proceedings. Judge Pratt did not then and has not yet ordered the Government attorney to disclose to petitioner the nature and substance of the grand jury proceedings nor whether there is a transcript of these proceedings. As indicated in the transcript of the ruling on the motion to dismiss (furnished with petitioner's brief), Judge Pratt believes there is a sound legal basis for his decision. Therefore, petitioner Shalla can only be *guessing* at whether hearsay testimony was exclusively relied upon by the grand jury in returning its true bill and whether there is no transcript of the proceedings. There is no *factual* basis for this petition. It is premature and, for that reason alone, ought to be dismissed.

However, should this court conclude that there is a factual basis for this petition, respondent submits that the first question raised by Shalla (which *assumes* as a premise that hearsay evidence was exclusively relied upon by the grand jury in returning a true bill) is neither unique nor of first impression in the Sixth Circuit or elsewhere. In *Costello vs U.S.*, 350 U.S. 359 (1956), Mr. Justice Black writing for the majority said at p. 363:

> In *Holt v. United States*, 218 U.S. 245, this court had to decide whether an indictment should be quashed

> because supported in part by incompetent evidence. Aside from the incompetent evidence, "there was very little evidence against the accused". The court refused to hold that such an indictment should be dismissed, pointing out that, "The abuses of criminal practice would be enhanced if indictments could be upset on such a ground". 218 U.S. at 248. The same thing is true where as here all the evidence before the grand jury was in the nature of "hearsay". If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for a trial of the charge on the merits. The Fifth Amendment requires nothing more.

The United States Supreme Court has acknowledged that even other types of "incompetent" evidence may be presented to a grand jury. See *Lawn v. United States*, 355 U.S. 339, 349 (1958); *United States v. Blue*, 384 U.S. 251, 255 (1966).

The circuit courts have consistently held that hearsay or other inadequate evidence will not invalidate an indictment. This is true even in the Second Circuit despite the so-called "Umans Rule".

Judge Medina wrote in *United States v. Callahan*, 439 F. 2d 852, 860 (2nd Cir., 1971), certiorari denied 40 L.W. 3162:

> This court has never dismissed an indictment because the indictment was supported only by hearsay, and this statement applies both before and after the classic statement by Judge Learned Hand in *Costello*, 221 F. 2d at p. 679.

In the footnote, Judge Medina stated as follows:

> The writer of this opinion still believes there was some merit in his dissent in *United States vs. Beltram*, 388 F. 2d 449, 451 (2nd Cir.), cert denied, 390 U.S. 1017 (1968) but that dissent remains only a dissent from the prevailing view, and it was applicable only to a particular undesirable practice in narcotics cases which has long since been abandoned.

A sampling of other than Sixth Circuit Court decisions indicates agreement with Judge Medina:

District of Columbia

Laughlin v. United States, 385 F. 2d 287, 291 (D.C. Cir., 1967), certiorari denied 390 U.S. 1003.

Crump v. Anderson, 352 F. 2d 649, 651-652 (D.C. Cir., 1965).

Second Circuit

United States v. Callahan, 439 F. 2d 852, 860 (2nd Cir., 1971), certiorari denied 40 L.W. 3162.

United States v. Leibowitz, 420 F. 2d 39, 41-42 (2nd Cir., 1969) and cases cited therein.

Third Circuit

United States v. Rundle, 383 F. 2d 421, 424 (3rd Cir., 1967), certiorari denied 393 U.S. 863.

United States v. Grosso, 358 F. 2d 154, 163 (3rd Cir., 1966), reversed on other grounds 390 U.S. 62 (1968).

Fourth Circuit

United States v. Johnson, 419 F. 2d 56, 58 (4th Cir., 1969), certiorari denied 90 S. Ct. 1235 (1970).

Stem v. Turner, 370 F. 2d 895, 899 (4th Cir., 1966).

Fifth Circuit

Cohen v. United States, 436 F. 2d 586, 587 (5th Cir., 1971), certiorari denied 403 U.S. 908.

United States v. Howard, 433 F. 2d 1, 2-3 (5th Cir., 1971), certiorari denied 401 U.S. 918.

Seventh Circuit

United States v. Aloisio, 440 F. 2d 1119, 1125 (7th Cir., 1971), certiorari denied 40 L.W. 3162.

United States v. Daddano, 432 F. 2d 1119, 1125 (7th Cir., 1970), certiorari denied 401 U.S. 967.

United States v. Braico, 422 F. 2d 543, 545 (7th Cir., 1970), certiorari denied 398 U.S. 912.

Eighth Circuit

United States v. Gross, 416 F. 2d 1205, 1210 (8th Cir., 1969), per Blackmun, J., certiorari denied 397 U.S. 1013.

Cardella v. United States, 375 F. 2d 222, 226 (8th Cir., 1967), certiorari denied 389 U.S. 882.

Ninth Circuit

Reyes v. United States, 417 F. 2d 916, 918-919 (9th Cir., 1969)

Jack v. United States, 409 F. 2d 522, 523 (9th Cir., 1969)

Even in the Sixth Circuit the question is not one of first impression. In *United States v. Barnes*, 313 F. 2d 325, 326 (6th Cir., 1963), also a tax case, the same hearsay question was raised and decided against the defendant. (See also *United States v. Hoffa*, 349 F. 2d 20, 43 (6th Cir., 1965), affirmed 385 U.S. 293, rehearing denied 386 U.S. 940) where the testimony of Edward G. Partin, the Secretary-Treasurer and Business Manager of Teamsters' Local No. 5 was directed chiefly at implicating defendant Hoffa and another defendant in their endeavors to bribe jurors. In response to an argument similar to Shalla's, Chief Judge Weick, wrote:

> "The Government was not obligated to call Partin as a witness before the grand jury, much less to persuade him to testify, even assuming that it might have been able to do so.
>
> "It is further contended that without the testimony of Partin there was no competent evidence before the grand jury to support the indictment of Hoffa. This would not justify quashing the indictment. *Martin v.*

United States, 335 F. 2d 945 (C.A. 9, 1964). Hearsay evidence is sufficient. *Costello v. United States*, 350 U.S. 359, 76 S. Ct. 406, 100 L.Ed. 397 (1956)."

With regard to Shalla's second contention (that it was error not to preserve the grand jury testimony), many cases hold that grand jury minutes need not be preserved:

United States v. Aloisio, 440 F. 2d 705, 708 (7th Cir., 1971), certiorari denied 40 L.W. 3162.

United States v. Kind, 433 F. 2d 339, 340 (4th Cir., 1970).

United States v. Ybarra, 430 F. 2d 1230, 1233 (9th Cir., 1970), certiorari denied 400 U.S. 589.

United States v. Franklin, 429 F. 2d 214, 276 (8th Cir., 1970), certiorari denied 400 U.S. 967.

United States v. Montyo, 424 F. 2d 207, 210 (1st Cir., 1970), certiorari denied, 400 U.S. 836.

United States v. Hensley, 374 F. 2d 341, 352 (6th Cir., 1967), certiorari denied 388 U.S. 923.

United States v. Cianchetti, 315 F. 2d 584, 591 (2nd Cir., 1963).

Baker v. United States, 412 F. 2d 1069, 1073 (5th Cir., 1969), certiorari denied 396 U.S. 1018.

McCaffrey v. United States, 372 F. 2d 482, 484 (10th Cir., 1967), certiorari denied 387 U.S. 945.

There is ample law against the petitioner. His petition should be dismissed upon these reasons alone.

III.

In any event, should this court decide that within its power of superintending control over inferior courts in the Sixth Circuit, that the relief requested by petitioner reflects a better judicial policy than that now alleged to be in force, respondents urge that any new rules dealing with grand jury proceedings or with transcripts of them be applied prospectively only. For this reason alone, petition should be dismissed.

Respectfully submitted,

RALPH B. GUY, JR.
United States Attorney

LOREN G. KEENAN
Chief Trial Attorney
Attorneys for Respondents

Dated: December 8, 1971.

STIPULATION

(United States District Court—Eastern District of Michigan—Southern Division)

It is hereby stipulated by and between the United States of America, through its representative, the United States District Attorney, and Richard Shalla, Defendant, by his attorney, Louis J. Colombo, Jr., as follows:

1. That no written transcript of the proceedings before the United States Federal Grand Jury, which returned the Indictment against Richard Shalla, was made.

2. That Richard Shalla, through his Counsel, Louis J. Colombo, Jr., orally and in writing, offered himself as a

witness to the Grand Jury prior to the Indictment being returned, but that Richard Shalla was not, in fact, called as a witness before the Grand Jury.

3. That Harry G. Mutter was available as a witness to the Grand Jury and while he could have been called as a witness he was not presented to the Grand Jury as a witness.

4. That either Richard Shalla and/or Harry G. Mutter were the only persons who had direct knowledge or evidence of the nature of the transaction which was the subject matter of the Indictment in this cause and who could have presented direct testimony to the Grand Jury as to whether the transaction in question and the money passed between Harry G. Mutter and Richard Shalla was nontaxable income as contended by Richard Shalla, or taxable income as contended by the United States Government.

UNITED STATES OF AMERICA
UNITED STATES DISTRICT ATTORNEY
By: LOREN KEENAN,
Ass't U. S. District Attorney
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226-3100

RICHARD SHALLA, *Defendant*
By: LOUIS J. COLOMBO, JR.
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645-9300

APPENDIX "F"

(United States Court of Appeals—Sixth Circuit)
(Filed December 28, 1971)

Richard R. Shalla, *Petitioner,* v. United States District Court For the Eastern District of Michigan, Southern Division and Honorable Philip Pratt, *Respondents.*	No. 71-1998

ORDER DENYING PETITION FOR WRIT OF MANDAMUS

Before: Phillips, Chief Judge, and Peck and Miller, Circuit Judges.

On reviewing the petition for writ of mandamus to compel the respondent District Judge to vacate an order denying petitioner's motion to quash an indictment, and finding no clear right to the issuance of said writ and no claims of constitutional deprivation which cannot be vindicated at the trial of the criminal charge, it is ordered that the petition for writ of mandamus be denied, and that the petition be dismissed.

Entered by order of the court.

James A. Higgins,
Clerk.

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MICHAEL RODAK, JR., CLERK

No. 71-957

In the Supreme Court of the United States

OCTOBER TERM, 1971

RICHARD R. SHALLA, PETITIONER

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, and HONORABLE PHILIP PRATT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-957

RICHARD R. SHALLA, PETITIONER

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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, and HONORABLE PHILIP PRATT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, indicted for willful attempts to evade his federal income tax, in violation of Section 7201 of the Internal Revenue Code of 1954, moved to dismiss the indictment on the grounds that (1) only hearsay evidence was presented to the grand jury; and (2) no transcript was made of testimony before the grand jury. After the district court denied this

motion, petitioner sought a writ of mandamus in the court below to compel the district court to grant the motion to dismiss. That court denied the petition for writ of mandamus (Pet. App. 29a).

The court below correctly concluded that petitioner was not entitled to a writ of mandamus. A mandamus proceeding against a judge is an extraordinary remedy which should be reserved for exceptional cases and not used as a substitute for an appeal. *Ex parte Fahey*, 332 U.S. 258, 259-260; *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 27. Cf. *Will* v. *United States*, 389 U.S. 90, 96-97. The decision of the district court "involved no abuse of judicial power, and any error which it may have committed is reviewable by the circuit court of appeals upon appeal appropriately taken from a final judgment, and by this Court by writ of certiorari." *Roche* v. *Evaporated Milk Assn.*, *supra*, at 27.

Moreover, petitioner's factual contentions that only hearsay testimony was presented to the indicting grand jury and that no transcript of the testimony was made have never been established. The proposed stipulation relied upon by petitioner (Pet. App. 27a-28a) has never been signed or otherwise agreed to by a representative of the government.

Even assuming *arguendo* that the facts are as petitioner believes them to be, the federal courts have all held against petitioner's contentions. An indictment is not subject to dismissal on the ground that it is based entirely on hearsay evidence presented to the

grand jury.[1] *E.g.*, *Costello* v. *United States*, 350 U.S. 359; *Crump* v. *Anderson*, 352 F. 2d 649, 651-652 (C.A. D.C.); *United States* v. *Callahan*, 439 F. 2d 852, 860 (C.A. 2), certiorari denied, 404 U.S. 826. Nor is there any requirement that grand jury testimony be recorded or preserved. Failure to do so is therefore no ground for dismissal. *United States* v. *Montijo*, 424 F. 2d 207, 210 (C.A. 1), certiorari denied, 400 U.S. 836; *United States* v. *Cianchetti*, 315 F. 2d 584, 591 (C.A. 2).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1972.

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[1] In *United States* v. *Leibowitz*, 420 F. 2d 39, the Second Circuit recently threatened to consider dismissal of future indictments if it clearly appears that only hearsay was used before the grand jury when direct testimony was available and, either the grand jury was misled into thinking it was receiving eyewitness testimony, or it appears highly probable that, with eyewitness testimony rather than hearsay testimony, the grand jury would have failed to indict. No indictment has yet been dismissed on such a ground.

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